Nos. 96-330 & 96-742

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, *Petitioner*,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION, *Respondents*.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK, *Petitioners*,

—v.—

DOW CORNING CORPORATION, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION

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35 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the decision of the United States Sixth Circuit Court of Appeals in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) is reviewable by this Court in light of the present procedural posture of the case?

2. Whether the decision of the United States Sixth Circuit Court of Appeals in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) conflicts with the decisions of other Courts of Appeals regarding the scope of "related to" jurisdiction under 28 U.S.C. § 1334(b)?

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, Respondent Bristol-Myers Squibb Company states that it does not have a parent company. The subsidiaries (other than wholly owned subsidiaries) of Bristol Myers Squibb Company are:

Bristol-Myers Lion Ltd.
Bristol-Myers Squibb G.M.B.H.
Mead Johnson (Guangzhou) Ltd.
P.T. Squibb Indonesia
Synbiotics Limited
Laboratories UPSA SAS
RCS Realty Corporation
Sino American Shanghai Squibb Pharma Ltd.
Squibb Nigeria Limited
2309 Realty Corporation

Respondent Medical Engineering Corporation states that it is a wholly owned subsidiary of Bristol-Myers Squibb Company. Medical Engineering Corporation does not have any subsidiaries (other than wholly owned subsidiaries).

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COUNTER-STATEMENT OF THE CASE

Respondents Bristol-Myers Squibb Company ("BMS") and Medical Engineering Corporation ("MEC"; collectively, "Respondents") respectfully pray that the petitions of the Official Committee of Tort Claimants (the "Tort Committee") and the breast implant claimants represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Claimants"; collectively, the "Petitioners") for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) be denied.

A. Breast Implants and the Bankruptcy of Dow Corning

Petitioners' requests for certiorari arise from the chapter 11 bankruptcy proceedings of Dow Corning Corporation ("Dow Corning" or the "Debtor") pending in the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division (the "Bankruptcy Court"). Dow Corning, a financially healthy company, was driven into bankruptcy by an avalanche of actions brought against it for injuries allegedly sustained by recipients of silicone-gel breast implants.[1]

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[1] As of May 15, 1995, the date on which it filed for bankruptcy, Dow Corning had been named as a defendant in more than seven thousand suits. Despite the avalanche of suits, and in contrast to the assertions made by the Tort Committee on page 5 of its Petition, there has never been any reliable scientific evidence to support the claim that silicone-gel breast implants cause autoimmune or other systemic disease. *See generally* Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case*, (W.W. Norton & Co. 1996).

Like Dow Corning, Respondents and others[2] are named as defendants in thousands of suits seeking damages for injuries allegedly caused by silicone-gel breast implants. In many of these suits, Dow Corning is named as a party defendant with Respondents because: (i) it supplied silicone gel (or other silicone components) to the Respondents; or (ii) the actions involve implants manufactured by both MEC[3] (or one of its predecessors) and Dow Corning. Additionally, in the vast majority of these actions, the plaintiffs assert that Dow Corning and Respondents are joint tortfeasors.

B. Consolidation and the Global Settlement

Due to the rapidly growing number of breast implant suits being commenced in federal courts, the Judicial Panel on Multidistrict Litigation (the "MDL"), on June 25, 1992, ordered the transfer of all breast-implant actions pending in the federal courts to the Honorable Sam C. Pointer, Jr., Chief Judge, United States District Court for the Northern Division of Alabama (Southern Division) for the coordination of pretrial proceedings. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1100 (J.P.M.L. 1992). In transferring these actions, the MDL determined that consolidation of all federal implant actions would avoid duplication of discovery, prevent inconsistent pretrial rulings and conserve the parties' resources. *Id.*

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[2] Baxter International Incorporated, Baxter Healthcare Corporation (collectively, "Baxter"), Minnesota Mining and Manufacturing Company ("3M"), and Dow Corning's parent corporations, The Dow Chemical Company and Corning, Inc. (together, the "Shareholders"). Collectively, Respondents, Baxter, 3M and the Shareholders are referred to herein as the "Non-Debtors."

[3] BMS never designed, manufactured, marketed or sold any silicone gel breast implants or any material or components for such implants. Rather, since 1982 it has owned all of the shares of MEC, which manufactured, sold and distributed breast implants from 1969 to 1991.

By Order dated April 1, 1994, Judge Pointer preliminarily certified one class action for settlement purposes. On September 1, 1994, Judge Pointer approved a complex settlement agreement (the "Global Settlement") between members of the Settlement Class and certain defendants that contemplated the creation of a $4.25 billion settlement fund. Approximately 440,000 claimants registered as potential participants in the Global Settlement. Because of: (i) the large number of opt outs; (ii) the large number of claims against the settlement fund; and (iii) the bankruptcy of Dow Corning, a revised settlement program, which did not include Dow Corning, was approved by Judge Pointer by Order dated December 22, 1995 (the "Revised Settlement Program"). Several appeals have been taken from the Revised Settlement Program, which are presently pending in the Eleventh Circuit.

Pursuant to the Revised Settlement Program, 3M, Baxter, and Respondents will pay benefits to breast implant recipients which are assured and not subject to further reduction. Breast implant recipients are presently electing whether to accept the Revised Settlement Program, which provides for extended opt-out periods.

C. Removal of State Court Cases and The Transfer Motion

On June 5, 1995, following Dow Corning's filing for bankruptcy, Respondents along with the Debtor, Baxter and 3M began removing pending state court cases in which one or more plaintiffs in each suit had opted out of the Global Settlement and in which Dow Corning was a party (the "Opt-Out Actions") pursuant to 28 U.S.C. § 1452(a). Thereafter, on June 14, 1995, Respondents filed a motion in the United States District Court for the Eastern District of Michigan, Southern Division (the "District Court") seeking, *inter alia*, that the Court transfer the Opt-Out Actions to the District Court pursuant to 28 U.S.C. § 157(b)(5) (the "Transfer

Motion"). The Debtor, Baxter and 3M also filed similar motions.

On July 31, 1995, the District Court heard oral argument on the Transfer Motion. By Order and Opinion dated September 12, 1995 (the "September 12th Order"), the District Court denied the Transfer Motion. *See In re Dow Corning Corp.*, 187 B.R. 934 (E.D. Mich. 1995).[4] The District Court denied the Transfer Motion because it determined that no federal jurisdictional existed, under either "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) or supplemental jurisdiction under 28 U.S.C. § 1367(a).

D. Reversal by the Sixth Circuit

Respondents appealed from the September 12th Order. On April 9, 1996, the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") issued an opinion and order reversing the September 12th Order. 81 F.3d 635 (6th Cir. 1996). That opinion and order was subsequently withdrawn and on June 3, 1996, the Sixth Circuit issued an amended opinion and its mandate. *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) ("*Lindsey*"). In *Lindsey*, the Sixth Circuit determined, *inter alia*, that the claims pending against Non-Debtors were "related to" the Debtor's bankruptcy under 28 U.S.C. § 1334(b).[5] In reversing the September 12th Order, the Sixth Circuit remanded the matter to the District Court to determine

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[4] In a companion opinion, *In re Dow Corning Corp*, 187 B.R. 919 (E.D. Mich. 1995), the District Court refused to transfer the Opt-Out Actions pending against the Shareholders.

[5] Because the Sixth Circuit determined that "related to" jurisdiction existed, it did not address whether the District Court erred in determining that supplemental jurisdiction did not exist under 28 U.S.C. § 1367(a).

whether the Opt-Out Actions should be transferred to the District Court in accordance with 28 U.S.C. § 157(b)(5). *Id.* at 498. In connection with that determination, the Sixth Circuit noted that the District Court would be required to conduct an abstention analysis:

> to "determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of the bankruptcy cases."

Id. at 497 (quoting *Kelley v. Nodine* (*In re Salem Mortgage Co.*), 783 F.2d 626, 635 (6th Cir. 1986)).

E. Abstention Order and Further Proceedings

Although barely referenced by Petitioners,[6] following *Lindsey*, the District Court, on July 30, 1996, entered an order (the "Abstention Order") abstaining *en masse* under 28 U.S.C. § 1334(c) from transferring the Opt-Out Actions.[7] The Abstention Order is reprinted at 1a-8a. Thereafter, on August 13, 1996, each of the Respondents filed a notice of appeal with the District Court. On August 23, 1996, the Tort Committee filed a motion (the "Dismissal Motion") to dismiss the appeals. Respondents served their opposition papers on September 3, 1996.

On September 24, 1996, the Sixth Circuit entered an order directing that the Dismissal Motion be addressed in connection with the merits of the appeal. The Sixth Circuit order is reprinted at 9a-10a. The Sixth Circuit also expedited the

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[6] It is not until page 11 of its Petition that the Tort Committee notes: "[I]t happens that in this case, following the reversal and remand, the district court concluded that it should abstain . . ." Tort Committee Pet. at 11. The O'Quinn Claimants relegate this important fact to a footnote. O'Quinn Claimants Pet. 2-3 n.2.

[7] The Tort Committee filed its petition for certiorari on August 27, 1996,—a month after the District Court entered the Abstention Order. The O'Quinn Claimants served their original petition on August 29, 1996 and filed a corrected petition on November 12, 1996.

briefing schedule. As of November 19, 1996, the appeal has been fully briefed. Respondents have not been notified of the date for oral argument.

REASONS FOR DENYING THE WRIT

The *Lindsey* decision presents no important or novel legal question which would justify the issuance of a writ of certiorari. Initially, due to the District Court's decision to abstain, the issues sought to be reviewed are not presently justiciable. Because the Abstention Order has not yet been reversed by the Sixth Circuit, Petitioners seek review of issues that are at best not yet ripe for determination. At worst, assuming the Sixth Circuit does not reverse the Abstention Order, the petitions seek review of moot issues and the issuance of an advisory opinion from the Court. In any event, certiorari is not warranted at this time.

Moreover, contrary to Petitioners' assertions, the *Lindsey* decision neither conflicts with decisions of other Courts of Appeals nor represents "an unprecedented expansion of bankruptcy jurisdiction." Tort Committee Pet. at 4. The asserted "conflicts" are not genuine and simply reflect applications of the same or similar legal principles to different factual situations.

I.

Certiorari Should Be Denied Because There Are No Justiciable Issues Before the Court

Since *Marbury v. Madison*, 5 U.S. 137 (1803), the Court has recognized that judicial power of the federal courts is limited to "cases or controversies" under Article III of the Constitution. A "case or controversy" must be justiciable and not be moot, a political question or a request for an advisory opinion. *See United States v. Richardson*, 418 U.S. 166, 171 (1974). (citations omitted).

As Chief Justice Hughes explained in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937),

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

As demonstrated herein, while the issues raised by Petitioners may be intellectually stimulating, there are no justiciable issues to be determined in light of the Abstention Order. Whether these issues will ultimately become justiciable is wholly dependent upon the present appeal pending before the Sixth Circuit.[8] Regardless of the Sixth Circuit's ultimate determination, certiorari should be denied at this time. *Rice v. Sioux City Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (dismissing certiorari as improvidently granted, the Court stated: "this Court does not sit to satisfy a scholarly interest in such [abstract] issues").

A. Petitioners Seek Review of an Interlocutory Order

In *Lindsey*, the Sixth Circuit determined that the District Court has subject matter jurisdiction over the Opt-Out Actions and that transfer of the actions pending against the Non-Debtors under 28 U.S.C. § 157(b)(5) is permissible. *Lindsey*, 86 F.3d at 497; *accord A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986). The matter was then remanded to the District Court and thereafter the Abstention Order was entered.

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[8] As of November 19, 1996, the appeal was fully briefed. Respondents have not been notified of the date for oral argument.

Initially, the *Lindsey* decision is an interlocutory order that is not reviewable at this time. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (certiorari denied because the Court of Appeals remanded the case so the matter was not ripe for review by the Supreme Court). In general, the Court does not exercise certiorari jurisdiction prior to a lower court issuance of a final judgment. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372 (1893). In *American Constr.*, Justice Gray noted:

> Whether an interlocutory order may be separately reviewed by an appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree . . . unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

Id. at 384; *see also Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree.") (citation omitted).

B. The Issues Raised in the Petitions Are Not Ripe

Certiorari is not appropriate because the issues sought to be reviewed are not ripe. As one Circuit Court has noted:

> [the] [r]ipeness doctrine is drawn from both Article III limitations on judicial power and discretionary reasons of policy for refusing to exercise existing power. The central concern of both power and discretion is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.

Metzenbaum v. FERC, 675 F.2d 1282, 1289-90 (D.C. Cir. 1982) (quoting from C. Wright, A. Miller & E. Cooper, 13 *Federal Practice and Procedure: Jurisdiction* § 3532, at 237-38 (1975)).

Whether a decision is ripe for adjudication is "peculiarly a question of timing." *Anderson v. Green*, ___ U.S. ___, 115 S. Ct. 1059, 1060 (1995), *quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. *See Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981). Underlying the ripeness doctrine is the concept that courts should decide only a "real, substantial controversy", not a mere hypothetical question. *See City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989) (citation omitted).

In this case, the Abstention Order vitiated, at least for the time being, any practical effect of the determination in *Lindsey* that Petitioners seek to have this Court review. The issues raised in the Petitions ceased to be ripe when the District Court abstained and will only become ripe again if the Sixth Circuit reverses the Abstention Order and a final order is entered granting the Transfer Motion—future contingencies that may not occur. Accordingly, the issues raised by Petitioners are presently not ripe for adjudication.

C. Should the Sixth Circuit not Reverse the Abstention Order, the Issues Raised by Petitioners Are Moot

If the Sixth Circuit were to affirm the Abstention Order (or alternatively dismiss the appeals), the issues raised by the Petitioners would be moot. A moot controversy is one "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) (citation omitted). A moot case is not a "case or controversy" under Article III of the Constitution. *St. Pierre v. U.S.*, 319 U.S. 41, 42 (1943) ("a

federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it"); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983); *Defunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Because a moot controversy does not contain "live" issues, review will result in the issuance of an advisory opinion in contravention of Article III of the Constitution. *See Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). The limited exception to the mootness rule for cases that fall under the doctrine of "capable of repetition, yet evading review" is inapplicable in this case. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Although the O'Quinn Claimants purport that this exception is applicable to the instant case, it is not. O'Quinn Claimants Pet. at 2-3. In order for an action "to be capable of repetition, yet evading review", two elements must be satisfied: (i) the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and (ii) there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see also Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Assuming, *arguendo*, that the issues raised by Petitioners are "capable of repetition", they most certainly do not evade review.[9] For example, if the Sixth Circuit were to

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[9] In cases where the Court has invoked the "capable of repetition yet evading review" exception, the matter sought to be reviewed was of a limited duration. *See, e.g., Sosna v. Iowa*, 419 U.S. 393 (1975) (residency requirements); *Super Tire Engineering Corp. v. McCorkle*, 416 U.S. 115 (1974) (economic strikes); *Roe v. Wade*, 410 U.S. 113 (1973) (pregnancy); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (elections).

reverse and the Opt-Out Actions were to be transferred, the issues would no longer be moot and the Court could consider petitions for a writ of certiorari in the normal course. Similarly, if the same parties were to be subjected to this treatment again, it would be in the context of the transfer of the Opt-Out Actions which would not be of such a limited duration so as to avoid review.[10]

In sum, the issues raised by the Petitioners are not presently justiciable and certiorari should be denied.

II.

The Decision in *Lindsey* Would Be The Same Under Any Of The Tests For Determining "Related to" Jurisdiction

Even if the Court were to consider the issues raised in the petitions in the context of a final decision, certiorari should still be denied. Contrary to Petitioners' assertions, the decision in *Lindsey* is not in conflict with *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984) or *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Indeed, in issuing its ruling, the Sixth Circuit explicitly relied on the test for determining "related to" jurisdiction set forth in *Pacor*.[11]

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[10] The Tort Committee acknowledges this fact when it improperly characterizes the motives of the Non-Debtors. *See* Tort Committee Petition at 11 (noting that if the Opt-Out Actions were transferred, they would continue for an indefinite period).

[11] Similarly, *Lindsey* does not represent an "enormous destructive change in the American Tort System" or "violate[ ] basic principles allocating tort jurisdiction in our federal system" as the Tort Committee asserts. Tort Committee Pet. at 9. In *A.H. Robins v. Piccinin*, 788 F.2d 994, *cert. denied*, 479 U.S. 876 (1986), the Fourth Circuit considered similar issues and determined that actions pending against non-debtors were subject to transfer to the district where the Robins case was pending. Petitioners do not assert that a conflict among the Circuits exists with respect to the proper interpretation of 28 U.S.C. § 157(b)(5). Accordingly, certiorari is not appropriate as to that issue.

"Related to" jurisdiction stems from Section 1334(b) of Title 28 which provides, in relevant part, that:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

As this Court has previously noted, the scope of "related to" jurisdiction is not defined, but Congress intended it to be broad:

> Congress did not delineate the scope of 'related to'. . . jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. . . . We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), that **'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected to the bankruptcy estate,' and that the 'related to' language of § 1334(b) must be read to give district courts jurisdiction over more than simple proceedings involving the property of the debtor or the estate.'**

Celotex Corp. v. Edwards, ___ U.S. ___, 115 S. Ct. 1493, 1498-99 (1995) (emphasis supplied).

Petitioners' assertion that *Lindsey* conflicts with *Pacor* is unfounded. Initially, in determining that the District Court had "related to" jurisdiction over the Opt-Out Actions and that such actions were subject to transfer under 28 U.S.C.

§ 157(b)(5), the Sixth Circuit relied explicitly on the test set forth in *Pacor*:

> As stated in [*Pacor*], the "usual articulation of the test for determining whether civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor*, 743 F.2d at 994. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.*
>
> * * * *
>
> Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is "related to" a bankruptcy proceeding under Section 1334(b) in *Robinson*, 918 F.2d at 583 . . . . The majority of our sister circuits have likewise adopted the *Pacor* test for "related to" jurisdiction.

Id. at 489 (citations omitted). Virtually every Court of Appeals has embraced the test enunciated in *Pacor*, sometimes with minor modifications.[12]

While *Lindsey* explicitly relied on *Pacor*[13], Petitioners seem to take issue because of the difference in the holdings of these two cases. Initially, to the extent that Petitioners seek redress

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[12] *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002, (4th Cir.) *cert. denied*, 479 U.S. 876; *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 583-84 (6th Cir. 1990); *In re Dogpatch U.S.A.,Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 (11th Cir. 1990).

[13] Consistent with *Pacor*, the Sixth Circuit recognized that "related to" jurisdiction is not limitless. *Id.* at 490.

from the Court because they are displeased with the result in *Lindsey*, certiorari jurisdiction should not be exercised for the "the benefit of the particular litigants", but instead for the settlement of [issues] of importance to the public, as distinguished from . . . the parties." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 250 (1969) (Harlan, J. dissenting) (citations omitted); *see also* Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Moreover, the Tort Committee seems to suggest that a definite finding of liability is required under the *Pacor* test. Tort Committee Pet. at 14. Such a finding is not required:

> A key word in [the] test is "conceivable." Certainty, or even likelihood is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) (quoting *In re Smith*, 866 F.2d 576 (3d Cir. 1989)) (other citations omitted). Finally, the Sixth Circuit explained the difference in the outcome between *Lindsey* and *Pacor*:

> The potential for Dow Corning's being held liable to the non-debtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization. In addition, we believe there is a qualitative difference between the single suit involved in *Pacor* and the over-

> whelming number of cases asserted against Dow Corning and the non-debtor defendants in this case.

Id. at 494. Accordingly, *Lindsey* does not conflict with *Pacor*.

In addition, Petitioners assert that *Lindsey* "significantly diverges" from *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Tort Committee Pet. at 12. In fact, the result in *Lindsey* would be no different if the test in *Fedpak* were applied.[14]

In *Fedpak*, the debtor Fedpak Systems, Inc. ("Fedpak") was the developer and patent holder on a frozen dessert machine. *Id.* at 209. Shortly after filing for bankruptcy, Fedpak commenced a breach of contract action against Stanley Jones ("Jones"). *Id.* The Fedpak/Jones litigation was subsequently settled on appeal and Fedpak thereafter transferred all of its intellectual property rights in the machines to Polar Express International, Inc. ("Polar Express") in exchange for royalty payments. *Id.* at 210. Years later, at the request of Polar Express, Fedpak filed a motion seeking clarification of the findings of facts and conclusions of law issued by the bankruptcy court in the Fedpak/Jones Litigation.

On appeal, the Seventh Circuit noted that Fedpak did not have standing to request such an order. *Id.* at 212. Additionally, the Court noted that the bankruptcy court lacked jurisdiction to determine the rights of Jones and Polar Express to property outside of the Court's control. *Id.* at 213. In so ruling, the court set forth its test for determining jurisdiction: "[a] case is related to a bankruptcy case when the dispute 'affects the amount of property available for distribution [*i.e.*,

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[14] Equally unavailing is the assertion of the O'Quinn Claimants that the decision in *Lindsey* conflicts with that of *In re Turner*, 724 F.2d 338 (2d Cir. 1983) and *In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990). In *Lemco*, the Eleventh Circuit stated: "[w]e join the majority of the circuits that have adopted the *Pacor* formulation." *Id.* at 788. Moreover, the Opt-Out Actions have a "significant connection" with the Debtor's bankruptcy as required under *Turner*. *Turner, supra*, 724 F.2d at 341.

the debtor's estate] or the allocation of property among creditors.' " *Id.* at 213-14 (citations omitted).

Despite the Petitioners' assertions to the contrary, the *Fedpak* test does not "significantly diverge" from that of *Lindsey*. Indeed, in the instant case, application of the *Fedpak* test would not have changed the result. Unlike the thousands of claims pending against the Debtor, the claim in *Fedpak* was but a single claim. Moreover, as the Sixth Circuit noted, the claims for indemnification and contribution whether asserted by or against the Debtor will undoubtedly "affect the size of the estate"—*i.e.*, the amount of property available for distribution—as well as the Debtor's "ability to resolve its liabilities and proceed with reorganization"—*i.e.*, allocation of property among creditors. *See Lindsey*, 86 F.3d at 494.

In sum, there is no conflict among the Circuits with respect to "related to" jurisdiction and Petitioners' requests for certiorari should be denied.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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